89-166

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN RE LE PAPILLON, INC.,
IN RE YVES & PAUL, INC.,
IN RE AU CROISSANT, INC.,
YVES COURBOIS,

Petitioner,

v.

GANT REDMON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 31, 1989

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QUESTIONS PRESENTED

1. Whether a Bankruptcy Court's Failure to Determine the Reasonableness of Fee Requests Pursuant to Section 330(a) of the Bankruptcy Code Constitutes an Abuse of Discretion.

2. Whether Trustee's Fees and Attorney's Fees in Bankruptcy Proceedings May Be Settled By Private Agreement Among Parties in Interest.

PARTIES TO THE PROCEEDINGS

1. Yves P. Courbois, Petitioner, appeared as appellant below in appeal from the United States Bankruptcy Court for the District of Columbia to the United States District Court for the District of Columbia, and to the United States Court of Appeals for the District of Columbia Circuit. The Petitioner is President and sole shareholder of the debtor corporations.

2. Gant Redmon, Respondent, appeared as Appellee before the District Court and the Circuit Court below. The Respondent was trustee in bankruptcy for the debtor corporations.

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IN RE YVES & PAUL, INC.,
IN RE AU CROISSANT, INC.,
YVES COURBOIS,
Petitioner,
v.
GANT REDMON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Yves P. Courbois respectfully petitions for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the District of Columbia Circuit entered February 23, 1989, request for rehearing denied May 2, 1989, in Appeal No. 88-7244. This case seeks review of the Bankruptcy Court's award of trustee's fees and attorney's fees to the respondent Gant Redmon and to Redmon Law Offices.

OPINIONS BELOW

A copy of the *Per Curiam* order of the United States Court of Appeals for the District of Columbia Circuit *In re Le Papillon, Inc., et al.*, No. 88-7244, appears in the Appendix (hereinafter referred to as "App. ——") at 1a-2a. A copy of the unreported decision and order of the United States District Court for the District

of Columbia, *In re Le Papillon, Inc., et al.*, No. 88-0062, appears at App. 5a-10a. A copy of the order entered by the United States Bankruptcy Court for the District of Columbia, *In re Le Papillon, Inc.*, No. 84-00158; *In re Yves & Paul, Inc.*, No. 84-00159; *In re Au Croissant, Inc.*, No. 84-00160, awarding fees to the former trustee in bankruptcy and to the trustee's attorneys, appears at App. 11a-13a.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered February 23, 1989. A timely Motion for Rehearing and a Suggestion for Rehearing En Banc were denied on May 2, 1989. This Petition for Writ of Certiorari is being filed within 90 days of denial of rehearing pursuant to 28 U.S.C. sec. 2101(c) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Bankruptcy Code Section 330(a) (11 U.S.C. § 330(a))

§ 330. Compensation of officers.

(a) After notice and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney—

(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual, necessary expenses.

The following statutory provisions are set forth in the appendix:

1. Bankruptcy Code sec. 326 (11 U.S.C. sec. 326), Limitation on compensation of trustee.

2. Bankruptcy Code sec. 327 (11 U.S.C. sec. 327), Employment of professional persons.

3. Bankruptcy Code sec. 328 (11 U.S.C. sec. 328), Limitation on compensation of professional persons.

4. Bankruptcy Code sec. 329 (11 U.S.C. sec. 329), Debtor's transactions with attorneys.

STATEMENT OF THE CASE

In March of 1983, the corporations Le Papillon, Inc.; Yves & Paul, Inc.; and Au Croissant, Inc. filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the District of Columbia. On October 10, 1985, the respondent Gant Redmon was named trustee in bankruptcy for the debtor corporations. Mr. Redmon's law firm, Redmon law Offices, was appointed to serve as attorneys for the debtor corporations. Mr. Redmon hired a full-time manager for the corporate businesses, which are two restaurants and a wholesale and retail bakery operation.

Mr. Redmon served as the trustee in bankruptcy from October 10, 1985 to June 1, 1987. At the time Mr. Redmon filed his first request for interim compensation, the petitioner Mr. Courbois filed objections to the fee requests for both the trustee and the trustee's law firm. A creditor also opposed the trustee's fee request on the grounds that the effort expended by the trustee did not warrant the fees requested, which the creditor claimed were so excessive as to jeopardize the debtors' chances of successful reorganization. The bankruptcy court approved

the first interim request without a hearing, and Mr. Courbois moved for reconsideration. The bankruptcy court declined to reconsider the fee award on the grounds that, *inter alia*, a hearing would be held by the court at the time of the final fee applications in the case, at which time the court would hear any objections to the trustee's requests for compensation. A motion for leave to appeal was denied by United States District Judge June Greene, citing the reasons stated by the bankruptcy court.

During the remainder of Mr. Redmon's term as trustee, each request for compensation to Mr. Redmon and his law firm was reviewed by Mr. Courbois and his attorney, and objections were duly noted for the record. In accordance with the bankruptcy court's announced intention not to hold a hearing on fee applications until the case was concluded, Mr. Courbois made no attempt to present any evidence to support his objections.

One of the objections noted by Mr. Courbois was that the trustee failed on numerous occasions to make employee withholding and F.I.C.A. deposits to the Internal Revenue Service; Mr. Courbois also advised the bankruptcy court that the fee applications for the trustee and his law firm improperly requested compensation for time spent dealing with the Service concerning tax deposits the trustee had failed to make. Additionally, Mr. Courbois objected to time billed by the trustee's law firm for activities which did not require the services of an attorney.

Plans of reorganization for all three corporations were approved by the bankruptcy court on June 1, 1987, at which time the trustee was relieved from his duties and the debtor restored to possession. The plans called for the corporations to retain the manager hired by the trustee. The plans also provided for payment, with interest, of some $158,000 in post-petition taxes not remitted to the Internal Revenue Service during the period of Mr. Redmon's trusteeship. All other creditors were to receive one

hundred percent payment of their claims, without interest.

On September 10, 1987, a hearing was held on the subject of the trustee's fee applications. The fee applications were originally opposed by both Mr. Courbois and Internal Revenue Service. In its brief filed with the bankruptcy court, the I.R.S. took the position that, as a consequence of the "unconscionable malfeasance" of Mr. Redmon as trustee, in failing to remit trust fund taxes as accrued, "no fees whatsoever should be permitted." At the time of the hearing, after some negotiation, Mr. Redmon agreed to reduce his fee request to a combined total of $157,500 compensation for all amounts then claimed as due to Mr. Redmon as trustee and to Redmon Law offices as the debtors' attorneys. Counsel for the Internal Revenue Service and Mr. Courbois agreed to withdraw their objections to the fee requests. The bankruptcy court then directed the debtors' bankruptcy counsel and the former trustee to prepare a consent order embodying the terms of the agreement.

A consent order was prepared and circulated by the trustee to the debtors' bankruptcy counsel and to counsel for the Internal Revenue Service for signature. Before the consent order reached Mr. Courbois' attorney for signature, events transpired which caused Mr. Courbois to resume his objections to Mr. Redmon's claim for compensation.

On September 14, four days after the hearing on the trustee's fee applications, the manager who had been hired by the trustee abruptly and without prior notice terminated his employment with the debtor corporations. A subsequent investigation of the corporate books and records which had been maintained by the manager and his administrative assistant revealed, *inter alia*, a deficit in the corporate checkbook of approximately $100,000; several notices from the Internal Revenue Service for checks returned for insufficient funds, for postpetition

tax periods not included in the plans of reorganization; notice of unpaid sales taxes from the District of Columbia; and cancellation of all insurance for the three corporations and their businesses, for lack of payment to the insurance broker going back as far as 1986.

By the time they were advised of the situation, the debtors' bankruptcy counsel and counsel for the I.R.S. had already signed the consent order awarding Mr. Redmon $157,500 in fees. Counsel for Mr. Courbois advised the bankruptcy court that, due to the serious tax deficiencies of which his client was unaware at the time of the hearing, counsel for Mr. Courbois would not sign the order. The debtor's bankruptcy counsel advised the court that "the agreement of the Internal Revenue Service to the compromise contained in the [consent order] was obtained on the strength of representations which undersigned counsel now knows to be false," and requested that the bankruptcy court "set down a status hearing to determine how the parties should proceed on on the basis of these facts."

Without further comment or inquiry, the consent order was entered by the bankruptcy court on December 2, 1987.

On appeal to the United States District Court for the District of Columbia, Mr. Courbois urged that the Bankruptcy Court had a duty to review the award in light of the provisions of Section 330 of the Bankruptcy Code, and that its failure to determine the reasonableness of the award, notwithstanding the withdrawal of objections, constituted an abuse of discretion. He further urged that even a cursory review of the applications would demonstrate that the fees awarded to Mr. Redmon as trustee constituted an enhancement of his usual and customary fees as an attorney, and did not comport with the reasonableness requirements of Section 330.

The district court ruled (*see* App. 5a-10a) that Mr. Courbois' agreement to withdraw his objections to the

trustee's fee requests constituted a settlement binding on the parties; that the law, "necessarily including bankruptcy law" (App. 9a), favors settlement; and that events subsequent to September 10 did not justify setting aside the settlement. The district court further held that Mr. Courbois' appeal was without merit, but declined to impose sanctions as requested by the respondent Mr. Redmon.

Mr. Courbois noted a timely appeal to the Circuit Court of Appeals for the District of Columbia Circuit. Mr. Redmon moved for summary affirmance. On February 23, 1989, the circuit court granted Mr. Redmon's motion for summary affirmance (*see* App. 1a-2a) "substantially for the reasons stated by the district court" (App. 1a); the circuit court also ordered Mr. Courbois and his attorney to pay Mr. Redmon's costs and fees on appeal for "continu[ing] to mount meritless attacks against a valid settlement agreement" and wast[ing] judicial resources by making frivolous arguments." (App. 2a)

A timely motion for rehearing and suggestion for rehearing *en banc* were denied by the circuit court on May 2, 1989. (App. 3a, 4a)

Subsequent to the circuit court's summary affirmance, the former trustee Mr. Redmon moved to convert the corporations' Chapter 11 proceedings to Chapter 7. After an evidentiary hearing, that motion was denied by the bankruptcy court on March 29, 1989. The bankruptcy court's memorandum of decision and order denying the motion to convert appear at App. 14a-17a.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted to Settle Whether a Bankruptcy Court's Failure to Determine the Reasonableness of Fee Requests Pursuant to Section 330(a) of the Bankruptcy Code Constitutes an Abuse of Discretion.

Section 330(a) of the Bankruptcy Code, 11 U.S.C. § 330, authorizes compensation for services and reimbursement of expenses to officers of the bankruptcy estate and other professionals. Section 328 of the Code (11 U.S.C. § 328) sets limits on the compensation of professional persons and, together with section 329 (11 U.S.C. § 329), authorize the bankruptcy court to award fees to attorneys and professional persons on terms different than contracted for with the debtor or the trustee, where such compensation is unreasonable or the agreement otherwise turns out to have been improvident. Section 327 (11 U.S.C. § 327) authorizes the trustee to hire professional persons to assist him in administration of the estate. Section 326 (11 U.S.C. § 326) sets limits on the compensation of the trustee.

A. *The order of the District of Columbia Circuit sanctions a holding of the district court so far departed from the accepted and usual course of judicial proceedings in bankruptcy cases as to call for an exercise of this Court's powers of supervision.*

It is a well established principle of bankruptcy law that a bankruptcy court has an independent duty to review requests for trustee's fees and attorney's fees, even in the absence of objections to the fee applications. Federal bankruptcy courts from all other circuits have applied this principle; *see, e.g.*:

First Circuit. *In re Thomas*, 43 B.R. 510, 511 (Bkrtcy. D.Mass 1984) ("[T]his Court has an duty independent of any objection to determine the reasonableness of the amounts requested.").

Second Circuit. *In re Cuisine Magazine, Inc.*, 61 B.R. 210, 219 (Bkrtcy. S.D.N.Y. 1986):

> Regardless of the absence of any objections to a fee request by a party in interest, it is still incumbent upon the bankruptcy court to conduct its own independent analysis of all applications for compensation.

Third Circuit. *In re J.A. & L.C. Brown Co., Inc.*, 71 B.R. 197, 198 (Bkrtcy.E.D.Pa. 1987) (duty to determine reasonableness of fee requests "even without objections"); *Matter of Affinito & Sons*, 63 B.R. 495, 497 (Bkrtcy. W.D.Pa. 1986) ("independent duty and responsibility").

Fourth Circuit. *In re B&W Tractor Co., Inc.*, 38 B.R. 613, 616-617 (Bkrtcy.E.D.N.C. 1984) ("request for administrative expenses not 'deemed allowed' in the absence of an objection").

Fifth Circuit. *In re NRG Resources, Inc.*, 64 B.R. 643, 650 (W.D.La. 1986) ("bankruptcy court has an independent duty" to determine reasonableness of fee requests).

Sixth Circuit. *Matter of Baldwin-United Corp.*, 79 B.R. 321, 323 (Bkrtcy.S.D.Ohio 1987):

> [T]he Code contemplates that the Court will perform an independent review of fees requested by professionals in order to determine whether they are reasonable and whether the services performed and expenses incurred were actual and necessary. . . . Judicial scrutiny is required whether or not objections to fee requests are filed.

See also In re Kentucky Threaded Products, Inc., 49 B.R. 118, 120 (Bkrtcy.W.D.Ky. 1985) ("The lack of an objection . . . does not affect the Court's duty to fix reasonable compensation"); *Matter of Darke*, 18 B.R. 510, 514 (Bktcy.E.D.Mich. 1982) ("court has duty regardless of

whether or not objections are filed to determine whether compensation for . . . services is or is not reasonable").

Seventh Cricuit. *In re Pettibone Corp.*, 74 B.R. 293 (Bkrtcy.N.D.Ill.1987) ("Even if no party in interest objects . . . the court should review the application to make sure the compensation sought has been earned and is reasonable"); *In re Wildman*, 72 B.R. 700, 705 (Bkrtcy. N.D.Ill. 1987) ("bankruptcy judge has a duty to challenge requested fees *sua sponte*"):

> Clearly, the bankruptcy judge has the broadest discretion to review and question applications for compensation. Indeed, he has the inescapable statutory responsibility to do so.

Eighth Circuit. *In re S. Garrott & Sons*, 54 B.R. 221 (Bkrtcy. E.D.Ark. 1985) ("independent authority and responsibility to investigate reasonableness of compensation"); *Matter of Pothoven*, 84 B.R. 579, 583 (Bkrtcy. S.D. Iowa 1988):

> It is well established that a bankruptcy court has the independent authority and responsibility to determine the reasonableness of all fee requests, regardless of whether objections are filed.

Ninth Circuit. *In re Esar Ventures*, 62 B.R. 204, 205 (Bkrtcy.D.Hawaii 1986) ("duty to examine reasonableness of all fees even if there is no objection.").

Tenth Circuit. *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bkrtcy. D. Utah 1985) (duty regardless of objections).

Eleventh Circuit. *Matter of Ross*, 88 B.R. 471, 474 (Bkrtcy. M.D.Ga. 1988):

> Case law firmly establishes that the bankruptcy court has an affirmative obligation to evaluate the reasonableness of compensation to professional persons independent of any objection by a party in interest.

II. Certiorari Should Be Granted to Decide Whether Trustee's Fees and Attorney's Fees in Bankruptcy Proceedings May Be Settled By Private Agreement Among Parties in Interest.

The order of the Court of Appeals for the District of Columbia Circuit, affirming the district court's decision that trustee's fees and attorney's fees in a bankruptcy proceeding may be settled by private agreement, presents an important question of bankruptcy law which has not been but should be settled by this Court.

A. *The District of Columbia Circuit is in direct conflict with holdings of the Fifth Circuit and the Second Circuit regarding settlement of trustee's fees and attorney's fees in bankruptcy cases.*

The United States Court of Appeals for the Fifth Circuit has consistently held that determination of fees for officers of the bankruptcy estate is a duty of the bankruptcy court which is not within the contractual power of the bankrupt. In *Kolb v. Berlin*, 356 F.2d 269 (5th Cir. 1966), the Fifth Circuit held that

> once the bankruptcy petition is filed, the award of an attorney's fee is a responsibility of the Court which cannot be exercised by the bankrupt.

More recently, reviewing the case of *In re Hudson Shipbuilders, Inc.*, 794 F.2d 1051 (5th Cir. 1986), the Fifth Circuit rejected the notion that professional fees contracted or agreed upon by parties in interest were not subject to the bankruptcy court's review. The circuit court declared:

> We reject the appellant's casual characterization of the issue as merely involving a private negotiation in which the bankruptcy court had no interest. Once Hudson filed its petition for relief under Chapter 11, the entire estate of the debtor became subject to the

> jurisdiction of the bankruptcy court and the provisions of the Bankruptcy Code.

Id. at 1055.

Also in 1986, the Fifth Circuit affirmed a decision of the Bankruptcy Court for the Northern District of Texas, rejecting contractual fee agreements of parties in interest which did not comport with the reasonableness requirements of the applicable provisions of the Bankruptcy Code. In *In re Consolidated Bancshares, Inc.*, 49 B.R. 467 (Bkrtcy. N.D.Tex. 1985), *affirmed in part, vacated and remanded in part on other grounds sub nom. Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986), the bankruptcy court rejected a request for payment to an attorney based on a contingency fee agreement, stating: "[T]his Court is not bound by any contingent fee arrangement which the parties have agreed to among themselves." While noting that there is nothing inherently wrong with contingency fee agreements in a bankruptcy context, the bankruptcy court nevertheless declared:

> Section 330 (a)(1) [of the Bankruptcy Code] clearly restricts a fee award to only "reasonable compensation for *actual, necessary* services.

Id., 49 B.R. at 474 (Citations omitted; emphasis in original). Affirming, the Fifth Circuit held that

> the fact that the debtor's counsel made an agreement with the debtor to obtain . . . a contingency does not require the bankruptcy court to approve it . . .

785 F.2d at 1257.

The principle that professional fees in bankruptcy proceedings are not a matter for purely private agreement flows naturally from the bankruptcy court's statutory duty to review fee requests for reasonableness, and has therefore been espoused by many lower courts outside the Fifth Circuit. *See, e.g., In re Erwhon, Inc.*, 21 B.R. 79, 80

(Bkrtcy. Mass 1984) ("In a bankruptcy matter, fees are not a matter for purely private agreement."); *In re Harman Supermarket, Inc.*, 44 B.R. 918, 921 (Bkrtcy. W.D. Va. 1984):

> As between attorney and client, the fee is a contractual matter between the two parties. Such a fee may be subject to variation where a reasonable standard is applied . . .

See also, Cohen & Thiros v. Keen Enterprises, 44 B.R. 570, 572 (N.D. Ind. 1984):

> In bankruptcy cases, fees are not a matter for purely private agreement between the debtor and his attorney because every dollar paid to the debtor's attorney correspondingly depletes the fund to creditors.

Accord., In re Athos Steel and Aluminum, Inc., 69 B.R. 515, 521 (Bkrtcy. E.D.Pa. 1987).

The United States Circuit Court of Appeals for the Second Circuit is in agreement with this principle. Reviewing the railroad reorganization case *Matter of New York, New Haven and Hartford Railroad Company*, 632 F.2d 955 (2d Cir. 1980), that court observed:

> Normally courts are loathe to investigate the merits of the controversy underlying a compromise. In the case of a section 77 reorganization, however, it is clearly the duty of the reviewing court to make an independent determination on whether the plan is "fair and equitable" as required by section 77(e) of the Bankruptcy Act, even if the plan is the result of a compromise. . . . That a large majority of the creditors have voted to approve of the plan, as here, does not relieve the court of its responsibility.

Id. at 960 (footnotes omitted), citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.*, 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) and *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 114, 60 S.Ct. 1, 84 L.Ed. 110 (1939).

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari from the United States Court of appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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July 31, 1989

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7244

IN RE: LE PAPILLON, INC.,
d/b/a AU PIED DE COCHON, *et al.*

YVES COURBOIS,
Appellant

Before: MIKVA, RUTH B. GINSBURG and SILBERMAN,
Circuit Judges

ORDER

[Filed Feb. 23, 1989]

Upon consideration of the motion for stay pending appeal and the response, the motion for summary affirmance, the response and reply, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its Memorandum Order filed October 7, 1988. It is

FURTHER ORDERED that appellee's costs and counsel fees reasonably incurred on appeal be borne jointly and severally by appellant and attorney for appellant. *See* 28 U.S.C. §§ 1912, 1927; Fed. R. App. P. 38; *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056 (D.C. Cir. 1986) (where client and counsel who advanced frivolous argument for him, multiply proceedings unreason-

ably and vexatiously, they may be held accountable for expenses and attorney's fees incurred on appeal). Appellant has continued to mount meritless attacks against a valid settlement agreement. Appellee has not received any part of his fee. Appellant has wasted judicial resources by making frivolous arguments. The parties shall attempt to agree on the fee. If they are unable to reach an agreement, appellee shall submit to the court, within thirty days of the date of this order, a statement reflecting the hours spent on this appeal and counsel's rate. Appellant may respond to that statement within ten days. It is

FURTHER ORDERED that the motion for stay be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7244

IN RE: LE PAPILLON, INC.,
d/b/a AU PIED DE COHON

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER,
Appellant

Before: MIKVA, RUTH B. GINSBURG and SILBERMAN,
Circuit Judges

ORDER

[Filed May 2, 1989]

Upon consideration of appellant's petition for rehearing directed to the panel and appellant's Motion to Take Judicial Notice, it is

ORDERED, by the Court, that the motion to take judicial notice is denied and it is

FURTHER ORDERED, by the Court, that the petition for rehearing is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7244

IN RE: LE PAPILLON, INC.,
d/b/a AU PIED DE COCHON

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER,
Appellant

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

[Filed May 2, 1989]

Appellant's Suggestion For Rehearing *En Banc* and Motion To Take Judicial Notice have been circulated to the full Court. Upon consideration thereof it is

ORDERED, by the Court, *en banc*, that the motion to take judicial notice is denied and, no judge of the Court having requested the taking of a vote thereon, it is

FURTHER ORDERED, by the Court *en banc*, that appellant's suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0062-LFO

IN RE: LE PAPILLION, INC.
YVES & PAUL, INC.
AU CROISSANT, INC.

ORDER

[Filed Oct. 7, 1988]

This is an appeal from orders of the Bankruptcy Judge awarding fees and reimbursement for expenses to the Trustee for his services as Trustee and for legal services in this case. Appellant raises procedural and substantive issues.

As to procedure, appellant complains that he was not afforded a hearing on his objections to the awards sought by the Trustee. However, the record indicates that on numerous occasions in 1986, the Bankruptcy Court entertained and acted on applications by the Trustee for interim fee awards. An Appendix filed by appellee records three filings by or on behalf of appellant in opposition to these applications.

In January 1987, the debtor corporations had resumed possession of the formal bankrupt estates. In June 1987, the Trustee applied for a final award. On July 21, 1987, the debtor corporations, by their counsel, and Yves Courbois, as president and sole shareholder of the debtor corporations by his separate counsel, filed objections to the Trustee's application for final payment. Appendix at 28, 31. Neither objection stated any specific objection

to the application. The Courbois' filing requested a hearing.

On August 18, 1987, the Bankruptcy Judge scheduled for September 8, 1987, a hearing on "Application for Approval of Payment of Counsel's Fees and Costs and Trustee's Fees and Objections filed thereto by" Courbois, the debtor corporations, and the Internal Revenue Service.

Neither Courbois nor his counsel appeared on September 8, 1987. The record indicates that Courbois' counsel, Mr. Schwatzbach, was on vacation. Appendix at 60-61. Nevertheless, those present led by Mr. Seeber, counsel for corporate debtor (now back in possession), came close to negotiating a settlement. The proceeding was adjourned until September 10, 1987, so that Courbois' counsel could be present. Appendix at 61-63. Courbois and his counsel did, in fact, appear at the September 10 hearing. Appendix at 80. At that time counsel were completely free to conduct an evidentiary hearing. They requested none. Instead, a settlement was worked out, virtually in the presence of the Bankruptcy Court.

After encouragement from the Bankruptcy Judge, the parties present in court, including Courbois and his counsel, resumed the settlement negotiations which had nearly been concluded on September 8, including particularly compensation for the Trustee. After several recesses for telephone conferences between counsel present in court and clients who were elsewhere, Mr. Seeber announced a settlement, including particularly a settlement of appellee's claims for fees. Appendex at 83, 84. Following this announcement, Mr. Seeber stated on the record:

> And I would further state that Mr. Corboi [sic], individually, who was an objector is here in the courtroom with counsel and subscribes to that resolution.

Appendix at 85. To this, Courbois' counsel responded, also in open court,

> Your Honor, Mr. Seeber certainly has correctly set forth our agreement. We are, obviously, happy we could get the matter resolved.

Appendix at 86. Finally, the following colloquy occurred between the court and appellant's counsel:

> THE COURT: Very well. Now, Mr. Schwartzback [sic], could you address the Court?
>
> MR. SCWARTZBACK [sic]: Certainly, Your Honor.
>
> THE COURT: You have heard what Mr. Seeber and Mr. Gordon and Mr. Redmon had to say. Do you wish to add anything?
>
> MR. SCHWARTZBACK [sic]: I wish to add nothing, Your Honor.
>
> THE COURT: So their statements accurately represent your understanding of the agreements that have been made?
>
> MR. SCHWARTZBACK [sic]: They do.
>
> THE COURT: Thank you.
>
> MR. SCHWARTZBACK [sic]: Thank you.
>
> THE COURT: Mr. Early, do you wish to be heard?
>
> MR. EARLY: No, Your Honor.
>
> THE COURT: Now, Mr. Corboi [sic], you have heard what has been said. Do you understand?
>
> MR. CORBOI [sic]: Yes, I do.
>
> THE COURT: This is your agreement as well as the agreement of the three corporations?
>
> MR. SCHWARTZBACK [sic]: Well, I don't know that it is his agreement, now, Your Honor. He objects. He objected to the trustee's fees which is assessable to the corporations.
>
> THE COURT: Well, is he withdrawing his objection? Is he, as part of this agreement, withdrawing his objection?

MR. SCHWARTZBACK [sic]: I thought I made that clear when I addressed the Court and said that I, on behalf of Mr. Corboi [sic], restate what counsel has already told the Court.

THE COURT: I see. Very well. That was the only sense that I meant when I was asking Mr. Corboi [sic], was this his agreement.

MR. SCHWARTZBACK [sic]: I just don't want —

THE COURT: Does he understand that this is the agreement that had been reached and is he going to abide by it?

MR. SCHWARTZBACK [sic]: Well, I think that is the corporations abiding by it, Your Honor, within the plan itself. This is not Mr. Corboi's [sic] personal obligation.

THE COURT: I understand that, Mr. Schwartzback [sic]. I don't want to get into all of this debate through an argument with you. But I simply want to clarify that Mr. Corboi [sic] understands that he is withdrawing his objection to Mr. Redmon's claim in so far as that is reflected in the agreement that has been stated in open court.

MR. SCHWARTZBACK [sic]: And that is your understanding and agreement, is it not, Mr. Corboi [sic], as the Judge has presented it?

MR. CORBOI [sic]: Yes, it is

MR. SCHWARTZBACK [sic]: Yes, it is, Your Honor.

THE COURT: Wonderful. I am glad to know that we are all in agreement in so far as the agreement has been reached, as stated in open court, and I hope that the Internal Revenue Service and the three corporations and Mr. Corboi [sic] and Mr. Redmon and all are able to resolve the remaining

differences related to the funds that may be payable to the Internal Revenue Service as well.

Thank you all.

Appendix at 89-91.

Despite the foregoing commitment, Courbois through his counsel subsequently refused to sign a proposed order that would have executed the open court agreement. Claiming discovery of tax deficiencies after agreement to the settlement, Courbois's counsel served an opposition to it. On November 30, 1988, after considering these objections, the Bankruptcy Judge entered an order that awarded to appellee fees that were less than those agreed upon at the settlement, but acceptable to appellee. Appendix at 101-02. It is apparent from the face of the foregoing record that Courbois had ample opportunity to present his objections to the Bankruptcy Judge and exercised those opportunities by filing objections to applications for interim and final payments, and by pleadings and letters to the Bankruptcy Judge. The absence of Courbois and his counsel from the September 8 hearing is best explained by the fact that the latter was on vacation at the time. Moreover, both were present at the September 10 hearing. For ought that appears Courbois and counsel could have presented evidence. They chose not to do so. Rather they joined ongoing settlement negotiations that were consummated by a settlement literally on the record in open court. Courbois and his counsel have had all of the hearing and opportunity for advocacy to which they are entitled.

As to the substantive claim: a settlement is a settlement. The law, necessarily including bankruptcy law, favors settlement. *See, i.e., American Sec. VanLines v. Gallagher*, 782 F.2d 1056, 1060-63 (D.C. Cir. 1986). There is no allegation or proffered evidence of fraud in the inducement of the settlement. Appellant's claim that events subsequent to the settlement justified reneging on

it are completely without merit. In any event the post-settlement events were not demonstrably unforeseen at the time of settlement.

Appellee seeks an award to compensate him for attorneys' fees and costs incurred in his successful opposition of this appeal. While the appeal is without merit and appellant may well have abused the process of the Bankruptcy Court, appellee did not seek sanctions there. Nor should sanctions be imposed now merely because he exercised his right to appeal to this Court. It would be inappropriate to chill access to District Court review of the necessarily controversial rulings of the Bankruptcy Court.

Accordingly, the orders of the Bankruptcy Court awarding fees and costs to appellee are AFFIRMED. The application for sanctions is DENIED.

IT IS SO ORDERED.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
United States District Judge

Date: October 5, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Martin L. Bloom, Clerk
U.S. Bankruptcy Court for D.C.

IN RE:

Case No. 84-00158

LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER

Case No. 84-00160

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD

Debtors.

ORDER AWARDING TRUSTEE'S COMMISSIONS, COMPENSATION FOR ATTORNEYS FOR TRUSTEE, AND REIMBURSEMENT OF EXPENSES

[Filed Dec. 2, 1987]

At WASHINGTON, D.C., this 30th day of November, 1987:

This matter came on upon the Application of GANT REDMON for Trustee's Commissions, for approval of attorneys' fees payable to Redmon Law Offices and for reimbursement of expenses, and upon the objections thereto filed by the Internal Revenue Service, the debtors, and Yves Courbois, president of the debtors, and the parties having appeared before the Court at a hearing

thereon, and it appearing that all creditors have been given notice of the fee application, and that no other objections were filed, and the United States Trustee having consented to the said applications, and the objecting parties in interest having agreed to resolve their differences, and it further appearing that the Trustee and his attorneys provided valuable legal services which benefitted the estate by aiding in the resolution of the many disputes which have been the hallmark of these proceedings, and the Court having been fully advised, IT IS

ORDERED: That GANT REDMON is hereby awarded the sum of One Hundred Fifty-seven Thousand Five Hundred Dollars ($157,500.00) for Trustees' commission, and payment in full of the application of Redmon Law Offices for attorney's fees and for reimbursement of expenses; said sum shall be payable Seven Thousand Five Hundred Dollars ($7,500.00) on or before October 1, 1987, plus monthly payments of Two Thousand Five Hundred Dollars ($2,500.00) beginning November 1, 1987, and continuing for sixty (60) months, on the first of each month. These payments provide a total award of One Hundred Fifty-seven Thousand Five Hundred Dollars ($157,500.00) for any and all obligations of all three estates to Mr. Redmon and his law firm in any capacity whatsoever; and it is further,

ORDERED: That, although these matters have not been consolidated, because of the interrelationship among the three estates and the common benefit derived from the performance of the tasks enumerated in the applications, orders shall be entered in all three proceedings identical to the within Order, but the total compensation of One Hundred Fifty-seven Thousand Five Hundred Dollars ($157,500.00) reflects the award overall, and not in each particular case.

/s/ George Bason Jr.
GEORGE FRANCIS BASON, JR.,
United States Bankruptcy Judge

CONSENTED AND AGREED TO:

/s/ Brian R. Seeber
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/s/ Robert L. Gordon
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-158
Case No. 84-159
Case No. 84-160

Chapter 11

IN RE: LE PAPILLION, INC.
YVES & PAUL, INC.
AU CROISSANT, INC.

Debtors

MEMORANDUM OF DECISION

[Filed March 29, 1989]

These cases came before the court upon the motion of Gant Redmon, the former Chapter 11 trustee of the three debtors in possession, to convert all three cases to cases under Chapter 7. Heretofore by this court (Bason, J.), an order had been entered confirming the plans proposed for reorganization. The instant motion is opposed by the United States of America (Docket Entry 388), by a group of unsecured creditors, and by the debtors. The gravamen of the movant's motion is that he is not being paid out his trustee's fees as promised under the plan.

These jointly-administered cases were assigned to the undersigned because of the recusal of the Honorable S. Martin Teel, Jr., Judge of the United States Bankruptcy Court for the District of Columbia. Judge Teel had appeared in these cases on behalf of a creditor, the Internal Revenue Service, and was thereby disqualified.

In preparation for the hearing, the court reviewed the most recent part of these files and noted that during the course of the trusteeship of the movant, at the time when the restaurants were being managed by an individual under his supervision, there was a failure to pay trust fund and other taxes in an amount in excess of $158,000. Were the court to grant this motion, the movant would find himself in the position, after these cases were converted, the restaurants closed, and the furniture and fixtures liquidated, of being personally responsible for the repayment of taxes due in the course of his trusteeship that he had failed to pay.

Furthermore, the court understands that in the course of his trusteeship the movant supplied his manager with a rubber stamp for the purpose of affixing the trustee's signature to checks drawn on the debtors' accounts. From the record before this court, it appears that the trustee compounded the negligence by failing to be the individual who reviewed the statements of account when these were returned from the bank. Such a review would have shown that, while checks were written to the Internal Revenue Service on the trustee's account, these checks were returned for insufficient funds. A review would have spared the former trustee from the claim of gross negligence made by the Internal Revenue Service (Docket Entry 388) and would have avoided the apparent discrepancies between the IRS exhibits to that pleading and the trustee's accounting of receipts and disbursements (Docket Entry 427).

Finally, despite this unaceptable conduct, the trustee appears to have requested the absolute maximum compensation alowed under 11 U.S.C. § 326(a). It is puzzling that his recent reports appear to show the amount of restaurant sales and not the statutory measure of monies disbursed or turned over by the trustee to parties in interest. This is illustrated by one of the last reports by the trustee requesting compensation of $13,000 based on sales

for approximately ten hours work (Docket Entry 381).[1] As was pointed out by the district court on appeal in the case of *In re Roco Corp.*, 64 B.R. 499 (D. R.I. 1966), it was proper for the bankruptcy court to cut into this maximum award and to treat a petition for trustee's fees with conservatism.

As to the matter at hand, the court finds that while payments under the plan to Mr. Redmon are not moving as fast as promised, movant has not demonstrated the inability of debtors to effectuate substantial consummation, 11 U.S.C. § 1112(b)(7), or a material default thereunder, 11 U.S.C. § 1112(b)(8).

An order will be entered in accordance with the foregoing.

DATE: March 29, 1989

/s/ Paul Mannes
PAUL MANNES, Judge
United States Bankruptcy Court
for the District of Columbia
(Sitting by Designation)

cc: Saul Schwartzbach, Esq.
Brian Seeber, Esq.
Robert Coulter, Esq.
Steven Paleos, Esq.
Dennis Early, Esq.

Copies mailed to parties 3/29/89

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[1] This court believes that a 3% level of compensation to the trustee in a business operated by a full-time manager is excessive.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED
Case No. 84-158
Case No. 84-159
Case No. 84-160

Chapter 11

IN RE: LE PAPILLION, INC.
YVES & PAUL, INC.
AU CROISSANT, INC.

Debtors

ORDER DENYING MOTION TO CONVERT

[Filed April 3, 1989]

Upon consideration of the motion of Gant Redmon, former Chapter 11 trustee, to convert the above three cases to cases under Chapter 7, the court having stated its findings and conclusions in open court and having supplemented the same by memorandum submitted this day, it is this 29th day of March, 1989, by the United States Bankruptcy Court for the District of Columbia,

That the motion is denied.

/s/ Paul Mannes
PAUL MANNES, Judge
United States Bankruptcy Court
for the District of Columbia
(Sitting by Designation)

cc: Saul Schwartzbach, Esq.
Brian Seeber, Esq.
Robert Coulter, Esq.
Steven Paleos, Esq.
Dennis Early, Esq.

BANKRUPTCY CODE SECTION 326

(11 U.S.C. § 326)

§ 326. Limitation on compensation of trustee.

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed fifteen percent on the first $1,000 or less, six percent on any amount in excess of $1,000 but not in excess of $3,000, and three percent on any amount in excess of $3,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

(b) In a case under chapter 13 of this title, the court may not allow compensation for services or reimbursement of expenses of a standing trustee appointed under section 1302(d) of this title, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

(c) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.

(d) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

BANKRUPTCY CODE SECTION 327

(11 U.S.C. § 327)

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721 or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7 or 11 or this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

BANKRUPTCY CODE SECTION 328

(11 U.S.C. § 328)

§ 328. Limitation on compensation of professional persons.

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions ,the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or account for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

BANKRUPTCY CODE SECTION 329

(11 U.S.C. § 329)

§ 329. Debtor's transactions with attorneys.

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of and in connection with the case by such attorney, or the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred—

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11 or 13 of this title; or

(2) the entity that made such payment.